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March 19, 2010

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

I write to request information pertaining to the anticipated prosecutions of Khalid Sheikh Mohammed and four other 9/11 co-conspirators.

I am a strong opponent of civilian trials for Mohammed and the others, advocating instead that they be tried before a military commission at Guantanamo Bay. I believe civilian trials for these terrorists raise significant legal and national security concerns.

In January, the administration announced that it will no longer pursue its plan to try these terrorists in New York City, following significant opposition from New York lawmakers. The administration also indicated that it has not ruled out the possibility of using military tribunals. In testimony before the House Commerce, Justice, Science and Related Agencies Appropriations Subcommittee on March 16th, you indicated that the Department of Justice is "weeks away" from making a determination on where to try these terrorists.

As you know, the Sixth Amendment to the U.S. Constitution places limits on venue for criminal prosecutions, requiring that such cases be brought before "an impartial jury of the State and district wherein the crime shall have been committed." Federal law further instructs that "[t]he trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."¹

Given that a New York City trial is off the table, these restrictions appear to limit venue for a civilian trial to the U.S. District Court for the Western District of Pennsylvania or the Eastern District of Virginia. Is the Department assessing any other federal districts as possible locations for a civilian trial? What factors is the Department reviewing as part of its

¹ 18 U.S.C. § 3235.

determination? Is the Department also reviewing the use of military commissions? Is the Department limiting its review to domestic military commissions?

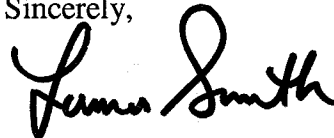
Furthermore, what role does the presumption of innocence play in the Department's review of where to try these terrorists? The U.S. Supreme Court notes that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."²

In an interview with *NBC News* on November 18, 2009, President Obama declared that Khalid Sheikh Mohammed will be convicted and executed.³ In testimony before the U.S. Senate, you stated that "[f]ailure is not an option. This--these are cases that have to be won. I don't expect that we will have a contrary result."⁴ Mohammed and his co-conspirators are afforded a presumption of innocence not only in a civilian trial but in a military commission as well.⁵ In light of this, does the Department believe it can successfully defend against an assertion by Mohammed and the others that these statements have tainted a civilian jury or commission members to such a degree as to deny them the presumption of innocence?

These and other legal issues pertaining to the prosecution of these terrorists are critical not only to America's national security but to the precedent that will be set for future trials of enemy belligerents. I request that you provide responses to these questions no later than Friday, April 9, 2010, so that Congress may have the benefit of that information as it debates this critical issue.

Thank you for your attention to this matter and I look forward to your prompt reply.

Sincerely,



Lamar Smith
Ranking Member

cc: The Hon. John Conyers, Jr.

² *Coffin v. United States*, 156 U.S. 432, 453 (1895).

³ *Obama: Alleged 9/11 leader will be executed*, NBC NEWS, Nov. 18, 2009, available at http://www.msnbc.msn.com/id/34015727/ns/us_news-security/.

⁴ James Taranto, 'Failure is Not an Option': Obama and Holder's assault on due process, THE WALL STREET JOURNAL, Nov. 20, 2009, available at

<http://online.wsj.com/article/SB10001424052748704888404574547933018090304.html>.

⁵ 10 U.S.C. § 949l(c)(1).